No. 80-1441

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM G. KODGER, ETC.,

Appellant

Vs.

W. J. SINGH, M.D.,

Appellee

On Appeal from the Supreme Court
of Ohio

JURISDICTIONAL STATEMENT

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February 23, 1981

QUESTIONS PRESENTED

I.

WHETHER THE OHIO MALPRACTICE STATUTE OF LIMITATIONS, WHICH SETS UP SEPARATE CLASSES OF SIMILARLY SITUATED MINOR PLAINTIFFS, SOME WHO ARE SUI JURIS AND OTHERS WHO AT THE SAME AGE ARE NON SUI JURIS, SHOULD BE EXAMINED UNDER MORE RIGOROUS SCRUTINY THAN THE "ANY CONCEIVABLE PURPOSE" TEST, WHEN CHALLENGED UNDER EQUAL PROTECTION.

II.

WHETHER THE OHIO MALPRACTICE STATUTE OF LIMITATIONS, WHICH PURPORTS TO LIMIT THE PERIODS WITHIN WHICH SEPARATE CLASSES OF SIMILARLY SITUATED MINOR PLAINTIFFS MAY BRING SUIT, VIOLATES THE VOID FOR VAGUENESS DOCTRINE BECAUSE THE STATUTE FAILS TO NOTIFY OF THE PRECISE LIMITATIONS INTENDED.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WILLIAM G. KODGER, ETC.,

Appellant

Vs.

W. J. SINGH, M.D.,

Appellee

On Appeal from the Supreme Court

of Ohio

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions below are reproduced in the Appendix. None have been reported, officially or otherwise. The opinions include the decision

of the Supreme Court of Ohio, dismissing Appellant's Appeal for want of a substantial constitutional question (Sup. Ct. Case No. 80-1033). Also found are the Eighth (Ohio) Appellate District's opinion that the relevant statute does not violate the United States Constitution (App. Ct. Case No. 41149) and the Cuyahoga County Court of Common Pleas' decision granting Summary Judgment without opinion (Common Pleas Case No. 974626).

GROUNDS FOR JURISDICTION

This is an appeal as of right. The Court has jurisdiction under 28 U.S.C. Section 1257(2) because Appellant below drew in question the validity of an Ohio statute, as being repugnant to the Equal Protection and Due Process Clauses of the United States Constitution. The decision below favored the validity of the statute. Pursuant to 28 U.S.C. Section 2403(B), the Attorney General of the State of Ohio has been served with notice that an Ohio statute has been drawn in question. The Supreme Court of Ohio's

decision to dismiss the Appeal was entered on November 26, 1980. The Eighth (Ohio) Appellate District's opinion upholding the statute was entered on June 19, 1980. The Common Pleas Court's decision granting Summary Judgment was entered on June 26, 1979.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 2305.11(B) of the Ohio Revised Code is at issue, as being repugnant to the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The pertinent provisions are reproduced in the Appendix. Sections 2305.11(A), 2305.11(D)(3), and 2305.16 of the Ohio Revised Code also are reproduced in pertinent part, as they relate to Section 2305.11(B).

STATEMENT OF THE CASE

A. Statement of Facts

William G. Kodger is the Appellant, as a minor by and through his father and next friend, Orville Kodger.

On October 22, 1975, William G. Kodger stepped on glass. He was fourteen years and ten months of age. He sought emergency treatment from W. J. Singh, M.D. Dr. Singh probed the left foot for glass, then released his patient without further treatment.

One year later, an X-ray of the foot revealed glass which Dr. Singh had failed to identify and remove. The appropriate standard of care required Dr. Singh to order an X-ray when he first saw the boy. This he failed to do.

Repair was attempted, but the glass had imbedded itself too far for removal without severing tendons. Removal was deferred.

Dr. Singh is the Appellee. He last treated the Appellant on October 22, 1975.

B. Statement of Legal Proceedings

Appellant sued Appellee on February 1, 1978. Appellee obtained Summary Judgment on a Statute of Limitations defense, granted without opinion on June 26, 1979.

Appellant challenged the statute's constitutionality, on grounds of Equal Protection and

Due Process under the United States Constitution, in his Brief opposing Summary Judgment. The constitutional issues were raised again on Brief to the Eighth District Court of Appeals. The Eighth District, by written opinion, upheld the statute.

Appellant argued in briefs at all levels for strict or at least factually rational scrutiny in testing constitutionality. No court below stated the test by which it measured the statute.

WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND REQUIRE PLENARY CONSIDERATION

The right of physical freedom from tortious invasion is fundamental in Anglo-American Jurisprudence, and deserves the greatest protections available. To protect that right, the American legal system allows, inter alia, free access to the courts to recover damages for personal injuries.

State practices generally are subject to more than minimal scrutiny when they impact such an important substantive right as the right

of access to the courts. Boddie v. Connecticut, 401 U.S. 371 (1971).

A statute of limitations which adversely restricts the rights of minors to redress wrongs caused by medical negligence, as opposed to other torts, must be measured against a stricter standard than traditional minimal rationality. Carson v. Maurer, (December 31, 1980, New Hampshire Sup. Ct. Doc. No. 80-017; squib reported at 49 U.S.L.W. 2502, February 10, 1981)(applying New Hampshire Equal Protection Clause).

In the instant case, the Ohio malpractice statute of limitations can not be sustained under any test short of Judicial abdication. The Ohio courts have refused to consider constitutional limitations upon the Ohio General Assembly's efforts to specially benefit the medical profession. The Ohio Supreme Court dismissed the subject case for want of a substantial constitutional question on the same day that the court stated it was reserving such constitutional questions for later review, because they had not been timely raised in Vance v. St. Vincent's Hospital, 64 Ohio St.2d 36, 414 N.E.2d 406 (1980).

Ohio provides that an action for malpractice must be commenced generally within one year of termination of the physician-patient relationship. Ishler v. Miller, 56 Ohio St.2d 447, 384 N.E.2d 296 (1978).

The Ohio Supreme Court now has held that a minor, under Ohio Revised Code, Section 2305.11(B), has until his fourteenth birthday to file suit if his cause accrues before he is ten years of age, but has only one year to file if his cause accrues after his tenth birthday. Vance v. St. Vincent's Hospital, 64 Ohio St.2d 36, 414 N.E.2d 406 (1980).

The effect is irrational. Consider two hypothetical minors. Both are age twelve. Both have medical malpractice claims. One cause accrued before age ten, and the other accrued after age ten but before age twelve. Although the same age, the minor whose cause first accrued may wait until his fourteenth birthday, while the other may not wait more than one year from accrual. The cause which last accrued must be filed first. One child is sui juris, the other is not.

There can be no rational basis for such disparate treatment, yet the courts below decided that the subject statute passed constitutional muster.

Clearly, the subject case involves a substantial constitutional question: The Ohio Judiciary refuses to enforce Equal Protection guarantees for minor plaintiffs who happen to sue in malpractice.

Additionally, the subject statute is void for vagueness. The scheme of Section 2305.11(B) suggests that a minor plaintiff who is over age ten when his cause of action accrues, shall have up to four years to file his suit. This interpretation was reached by the First (Ohio) Appellate District in Rembold v. Elizabeth Gamble Deaconess Home Assoc., (Ohio First App. Dist., Case No. C-790011, March 19, 1980; Unreported decision; Appeal filed c. December 26, 1980 in the Supreme Court of the United States).

The Ohio Supreme Court held otherwise in Vance v. St. Vincent's Hospital, 64 Ohio St.2d 36, 414 N.E.2d 406 (1980).

The language problem in Section 2305.11(B)

derives from using the word "limitations" without defining the limitations intended. The pre-Vance reader can not know whether the one year limitation of Section 2305.11(A) or the four year limitation of Section 2305.11(B) is intended. The problem is compounded because the statute lacks definition of when a cause of action accrues. E.g., a minor's cause of action does not accrue generally until he reaches the age of majority. Lanning v. Brown, 84 Ohio St. 385, 95 N.E. 921 (1911); Hart v. Guardian Trust Co., 75 N.E.2d 570, 581-82 (Ohio Eighth Dist. App., 1945).

The confusing language of the statute renders it void for vagueness, in violation of a minor plaintiff's right to adequate notice of when he must file suit.

For these reasons, the questions presented herein are substantial. They require plenary consideration before the Supreme Court of the United States.

Respectfully submitted,

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Telephone: (216) 241-4005

Dated: February 23, 1981

CERTIFICATE OF SERVICE

I certify that three copies of this Jurisdictional Statement with Appendices were served upon Steven W. Albert, attorney for Appellee at Kitchen Messner & Deery, 1305 Superior Bldg., Cleveland, Ohio 44114, and upon William J. Brown, Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, by placing the same in the United States Mail, postage prepaid, this 23d day of February, 1981.

STEPHEN G. THOMAS
Member of the Supreme
Court Bar

APPENDIX A -- OPINIONS AND ORDERS OF THE COURTS BELOW

THE SUPREME COURT OF THE STATE OF OHIO

No. 80-1033

THE STATE OF OHIO,)
)
City of Columbus) To Wit: November 26, 1980

1980 TERM

WILLIAM G. KODGER, ETC., Appellant,

Vs.

W. J. SINGH, M.D., Appellees.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of

the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ___ day of _____, 19 __

_____Clerk

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

County of Cuyahoga

No. 41149

WILLIAM G. KODGER, a Minor, by and through his father and next friend, Orville Kodger, Appellant

Vs.

W. J. SINGH, M.D., Appellee

APPEAL FROM CUYAHOGA COUNTY COMMON PLEAS COURT, No. 974626

JOURNAL ENTRY AND OPINION

DATE JUN 19 1980

JOHNSON, J.

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Cuyahoga County Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Cuyahoga County Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On October 22, 1975, William G. Kodger, hereinafter "Appellant" age fourteen years 10 months, entered the emergency room of Fairview General Hospital, Cleveland, Ohio, for treatment of his lacerated foot. He was treated by Dr. W. J. Singh, hereinafter Appellee, and released on that date. He never again was treated by Dr. Singh.

On September 22, 1976 appellant went to the

hospital for treatment of a second injury to his left ankle. X-rays showed a foreign object imbedded in the previously lacerated area. Follow-up surgery confirmed that a shard of glass was imbedded in the appellant's foot. It could not be removed without severing the tendons, so the surgery was terminated.

On September 17, 1977, through his father and next friend, Orville Kodger, plaintiff filed suit against the Fairview General Hospital Emergency department as the sole defendant. An amended complaint filed February 1, 1978 named Dr. Singh as a defendant.

Dr. Singh filed an answer and deposed the appellant and his father. A motion for leave to file an amended answer was granted and the amended answer set up the affirmative defense of the statute of limitations.

A subsequent motion for summary judgment was granted the appellee, Dr. Singh, holding that O.R.C. 2305.11(B) barred the Kodger claim.

FIRST ASSIGNMENT OF ERROR:

> "Whether the new medical malpractice statute of limitations, O.R.C. 2305.11(B), retains the tolling provision of O.R.C. 2305.16 up to a maximum of four years

> for a minor plaintiff who is fourteen years of age when the negligent act complained of occurs."

Under O.R.C. 2305.11(A) a malpractice action against a physician shall be brought within one year after the cause accrued. Section(B) states:

> "In no event shall any medical claim against a physician, podiatrist or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occured. The limitations in this section apply to all persons regardless of legal disability and notwithstanding Section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action against a physician or hospital."

We find nothing ambiguous in the wording of Sec. 2305.11(A) and (B). A person under age 10 shall have until the fourteenth birthday to file a claim. A person over age 10 must file his action within one year after the cause accrued. Section 2305.16, a statute in existence prior to Section 2305.11(A)(B), does not toll the application of the latter enactments. The tolling statute by its terms may be modified by "special provision" inserted into sections 2305.04 to 2305.14, inclusive. Before the adoption of 2305.11(B) O.R.C.,

Section 2305.11 did not contain any special provisions. It is clear that the statute was modified by the Legislature as applied to claims for medical malpractice.

SECOND ASSIGNMENT OF ERROR:

> "Whether the new medical malpractice statute of limitations should be voided because it violates the constitutional rights of the minor plaintiff and invades judicial prerogatives.

The second assignment of error claims that, as amended, section 2305.11(B) is unconstitutional as being contra to the Fourteenth Amendment of the United States Constitution and Article I, Section II of the Ohio Constitution.

At the outset, it must be observed that statutes of limitation by their very nature are arbitrary. As pointed out by the Supreme Court of Ohio in State, ex rel. Lourin v. Industrial Commission of Ohio, 138 Ohio St. 618, 21 O.O. 490, 492:

> "But the law abounds with situations where a difference of a minute may work a great change in rights and liabilities. Any statute of limitations illustrates this. In the interest of administrative workability, or to effect graduations in legislative policy, certain definite markers must be established, even though it may be

> admitted that an apparent hardship results to those whose rights lie just outside. It is, of course, for the Legislature to determine just when such boundaries shall be set."

We cannot agree with appellant that the enactment of Section 2305.11(B) unconstitutionally invades the judiciary's power to control the procedures of litigation.

In Wetzel v. Wetzel, 41 Ohio St.2d 137, 70 O.O.2d 227, the Supreme Court stated at page 229:

> "****, statutes of limitation are a legislative prerogative and their operation and effect are based upon impartial legislative policy."

The court also has noted in the delineation of rule making authority granted by Section 5(B) of Article IV of the Ohio Constitution that the judicial rules are limited to practice and procedure, and by such rules the court cannot abridge, enlarge or modify any substantive right. See Krause, Admr. vs. The State of Ohio, 31 Ohio St.2d 132; 60 O.O.2d 100.

The courts of Ohio have consistently held that statutes of limitation are to be the prerogative of the legislative branch. We must indulge a strong presumption of constitutionality in any

legislative action. We do not find a constitutional prohibition against O.R.C. 2305.11(B).

THIRD ASSIGNMENT OF ERROR:

> "Whether the defendant waived any statute of limitation defense by not asserting that defense in his original answer to the complaint."

Appellant also urges in his third assignment of error that the appellee waived his affirmative defense under the statute of limitations by not asserting that defense in his original answer.

Appellee, after filing his original answer, deposed the appellant and his father on November 30, 1978. Thereafter a motion for leave to file an amended answer, supported by affidavits and Briefs was filed on December 14, 1978. Upon allowance the appellee filed an amended answer setting out the statute of limitations as an affirmative defense.

We see no abuse of discretion in the trial court's action. Where the affirmative defense of the statute of limitations is properly made by an amended pleading allowed under Civil Rule 15, that defense is properly before the court for its disposition on a motion for summary judgment. See Mills, er al v. Whitehouse Trucking Co.,

FOURTH ASSIGNMENT OF ERROR:

> "Whether the foreign object 'discovery rule'should apply where the defendant's employer admits in its answer that a foreign object was discovered in the plaintiff's body.

Finally appellant contends that even though the physician-patient relationship terminated with the single treatment on October 22, 1975, that the "Discovery Rule" tolled the running of the statute of limitations and appellant's cause of action accrued when the piece of glass was discovered on September 22, 1976.

The Ohio Supreme Court in Melnyk v. Cleveland Clinic, 32 Ohio St2d 198, held that a foreign object which would toll the statute of limitations until discovery must have been placed within the plaintiff by the negligence of the physician.

The courts of Ohio have not gone so far as to permit the tolling of the statute of limitations for the failure to discover a foreign object already in place.

We find the errors assigned are not well taken and the trial court's ruling granting Summary Judgment is affirmed.

It is ordered that appellee recover of appellant his costs taxed herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ Nils P. Johnson

Nils P. Johnson
Retired Judge of the 7th Appellate District sitting by assignment in the 8th Appellate District

David D. Dowd, Jr., Judge of the 5th District Court of Appeals, Sitting by Assignment

Robert Cook, P. Judge of the 11th District Court of Appeals, Sitting by Assignment

Appearances:
Ellis B. Brannon & Stephen G. Thomas for Appellant
Charles W. Kitchen & Steven W. Albert for Appellee

IN THE COURT OF COMMON PLEAS, CUYAHOGA COUNTY

Kodger, et al.	)	
	)	
vs.	)	Judge Gorman
	)	
Fairview General Hospital Emergency Room Department	)	Case No. 77-974626

PARTIAL MOTION FOR SUMMARY JUDGMENT

Date 6/25/79: Defendant Singh's motion for partial summary judgment as to count one of the second amended complaint is Granted. No just cause for delay.

/s/ F. J. GORMAN

RECEIVED FOR FILING BY THE CLERK: JUN 26, 1979

APPENDIX B -- CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CURRENT OHIO REVISED CODE SECTION 2305.11 --
IN PERTINENT PART
(Effective July 28, 1975)

Section 2305.11 (Time limitations for bringing certain actions; definitions.)

(A) An action for . . . malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, . . . shall be brought within one year after the cause thereof accrued . . . .

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth

birthday in which to file an action for malpractice against a physician or hospital.

* * *

(D) As used in this section:

* * *

(3) "Medical claim" means any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care or treatment of any person.

* * *

FORMER OHIO REVISED CODE SECTION 2305.11 -- IN PERTINENT PART

(Effective October 1, 1953 through July 27, 1975).

Section 2305.11 Time limitations for bringing certain actions. (GC Section 11225)

An action for . . . malpractice . . . shall be brought within one year after the cause thereof accrued . . . .

OHIO REVISED CODE SECTION 2305.16

Section 2305.16 Disabilities; tolling of statute of limitations.

Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive . . . of the Revised Code, if a person entitled to bring any action mentioned in such sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed. . . .

* * *

APPENDIX C -- NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES OF AMERICA

IN THE SUPREME COURT OF THE STATE OF OHIO

WILLIAM G. KODGER, ETC., Appellant, -vs- W. J. SINGH, M.D., Appellee.	)	SUPREME COURT CASE NO. 80-1033
	)	NOTICE OF APPEAL TO THE SUPREME COURT OF THE STATE OF OHIO (sic)

Notice is hereby given that William G. Kodger, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Ohio, dismissing that portion of Appellant's appeal on the federal constitutional violations contained in Section 2305.11(B) of the Ohio Revised Code which dismissal was entered in this action on November 26, 1980. A copy of this Notice of Appeal has been filed in the Eighth (Ohio)

Appellate District, which possesses the record.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

/s/ Stephen G. Thomas

STEPHEN G. THOMAS
Member of the Supreme Court Bar
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CERTIFICATE OF SERVICE

Copies of this Notice of Appeal were served upon Steven W. Albert, attorney for defendant-appellee, at Kitchen Messner & Deery, 1305 Superior Building, Cleveland, Ohio 44114, and upon William J. Brown, Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, by placing same in the United States Mail, postage prepaid, this 20th day of February, 1981.

/s/ Stephen G. Thomas

STEPHEN G. THOMAS
Attorney for Appellant